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JOURNAL

Volume 31 • Number 3

Spring 2011

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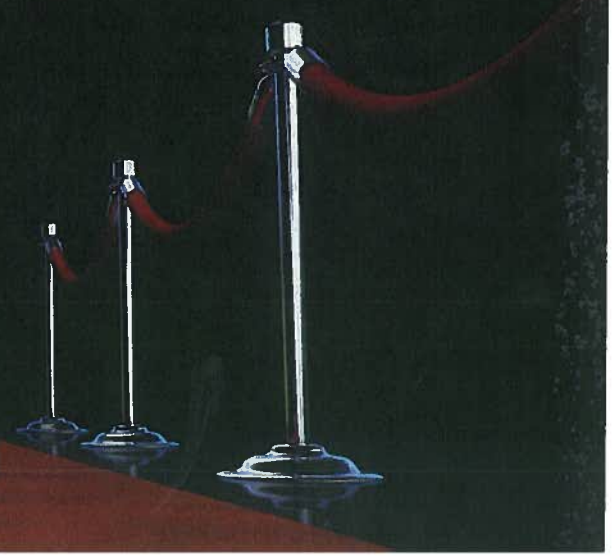
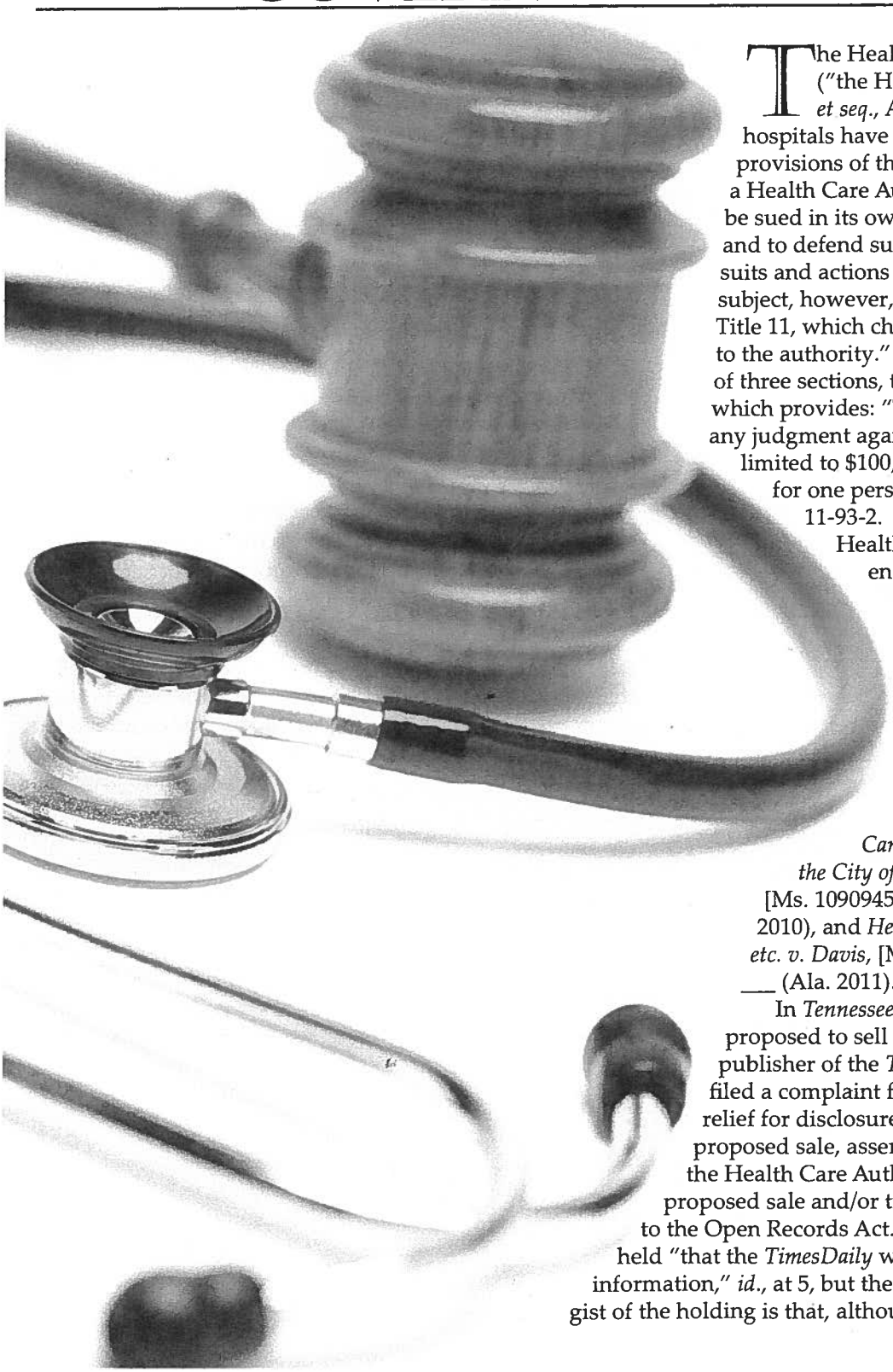


IS A HEALTH CARE AUTHORITY CONSTITUTIONALLY ENTITLED TO INVOKE THE $100.000 CAP ON LIABILITY FOR A LOCAL GOVERNMENT ENTITY?



The Health Care Authorities Act of 1982 ("the HCAA") is codified at § 22-21-310, *et seq.*, Ala. Code 1975. Many public hospitals have been reincorporated pursuant to the provisions of that Act. Section 22-21-318(a)(2) gives a Health Care Authority the power "[t]o sue and be sued in its own name in civil suits and actions, and to defend suits and actions against it, including suits and actions ex delicto and ex contractu, subject, however, to the provisions of Chapter 93 of Title 11, which chapter is hereby made applicable to the authority." Chapter 93 of Title 11 consists of three sections, the most important provision of which provides: "The recovery of damages under any judgment against a governmental entity shall be limited to $100,000.00 for bodily injury or death for one person in any single occurrence." § 11-93-2. This article questions whether a Health Care Authority is a "governmental entity" in any reasonable sense and, if not, whether it is a violation of the Constitution of Alabama of 1901 to limit liability of a Health Care Authority as though it were a city or county government.

Two recent opinions of the Supreme Court of Alabama make this question timely: *Tennessee Valley Printing Co., Inc. v. Health Care Authority of Lauderdale County and the City of Florence d/b/a Coffee Health Group*, [Ms. 1090945, Oct. 29, 2010] ___ So. 3d ___ (Ala. 2010), and *Health Care Authority for Baptist Health, etc. v. Davis*, [Ms. 1090084, Jan. 14, 2011] ___ So. 3d ___ (Ala. 2011).

In *Tennessee Valley*, a health care authority proposed to sell its hospitals to a private entity. The publisher of the *TimesDaily* newspaper in Florence filed a complaint for declaratory and injunctive relief for disclosure of the documents regarding the proposed sale, asserting that, "as a governmental entity, the Health Care Authority's records regarding the proposed sale and/or transfer of public assets were subject to the Open Records Act." *Id.*, Ms. at 4. The trial court held "that the *TimesDaily* was not entitled to the requested information," *id.*, at 5, but the Supreme Court reversed. The gist of the holding is that, although Health Care Authorities are

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statutorily exempt from the Open Meetings Act, they are not exempt from the Open Records Act. In short, the Board of Directors of a Health Care Authority can conduct meetings in secret, but at least some of its records are subject to disclosure as public records.

Neither of the parties in *Tennessee Valley* argued that the Health Care Authority of Lauderdale County and the City of Florence d/b/a Coffee Health Group was not in fact a local governmental entity or that the legislative attempt to declare it to be one ran afoul of the Alabama Constitution of 1901. The *TimesDaily* argued that the Health Care Authority was a governmental entity subject to the Open Records Act. The Health Care Authority argued that the legislative exemption of its meetings from public disclosure also exempted its records from public disclosure. The Court thus did not address, and has not on any other occasion addressed, arguments such as the ones set out below. Thus, although this was one of the first cases to reach the Supreme Court of Alabama regarding the Health Care Authority Act, no constitutional challenge was raised.

In *HCA for Baptist Health*, the Court held that a Health Care Authority whose creation is authorized by a state university is itself the State of Alabama within the meaning of Art. I, § 14, Ala. Const. 1901, which declares "That the State of Alabama shall never be made a defendant in any court of law or equity." This issue of sovereign immunity was not presented to the trial court, so there was no evidentiary record developed to test whether a state-university-authorized HCA is the sovereign State of Alabama. Nevertheless, the Court reached this issue raised for the first time on appeal and held that the Circuit Court of Montgomery County had no jurisdiction over a wrongful-death claim alleging medical negligence by Baptist Medical Center East in Montgomery.

Two months before Lauree Durden Ellison was treated at Baptist East, the non-profit entity known simply as Baptist Health had transferred its assets to the Health Care Authority for Baptist Health, an affiliate of UAB [University of Alabama at Birmingham] Health System, d/b/a Baptist Medical Center East. Baptist Health and UABHS had earlier entered into an "Affiliation Agreement" that governed their relationship. One provision was for the transfer of the assets back to Baptist Health. Plaintiff Davis, Ms. Ellison's personal representative, argued that this provision caused the transaction to violate § 22-21-339, Ala. Code 1975, which requires the transfer of an HCA's assets to the authorizing governmental entity upon dissolution of the HCA. The Circuit Court agreed and held - for this and other reasons - that the HCA for Baptist Health was not entitled to the $100,000 cap on governmental entity liability.

The Supreme Court reversed that holding, drawing a distinction between a retransfer of the assets by agreement and a transfer of the assets upon dissolution. After holding that the HCA for Baptist Health was a properly formed Health Care Authority, the Court addressed and agreed with the HCA's argument that it was the State of Alabama for purposes of § 14 and therefore entirely immune from suit. This holding mooted any issue as to the $100,000 cap.

Several *amici curiae* filed briefs in support of Ms. Davis's application for rehearing, including the Alabama Association for Justice. This article will not address the issues regarding whether a Health Care Authority whose formation is authorized by a state university with a medical school is in fact the State of Alabama. If the Supreme Court of Alabama retains its holding in the affirmative on that question, there may be room to raise additional appeals challenging the constitutionality or correctness of that holding on grounds not preserved for review in *HCA for Baptist Health v. Davis*. In the meantime, this article sets forth constitutional challenges that can be presented against the invocation by a county- or city-authorized HCA of the $100,000 limit on liability for governmental entities.

1. It Violates Equal Protection to Limit the Liability of Health Care Authorities

In *Chandler v. Hospital Authority of the City of Huntsville*, 500 So.2d 1012 (Ala. 1986), a plurality of the Alabama Supreme Court held that it was unconstitutional to grant immunity to one type of quasi-public hospital without granting such immunity to all other statutorily created quasi-public hospitals. The Court reasoned that a person injured at the immune hospital was denied equal protection of the law because he had no way of knowing that this particular hospital could injure him with impunity, whereas if he had gone to a hospital created under one of the other statutory schemes, he would be able to receive full compensation for any injuries he received due to the negligence of the hospital.[1]

In *Gaines v. Huntsville-Madison County Airport Authority*, 581 So. 2d 444 (Ala. 1991), a majority of the Court adopted the reasoning of *Chandler*, quoting it at length, 581 So. 2d at 447-448, and held, on the same basis as the holding in *Chandler*, that the statute at issue in *Gaines* was also unconstitutional. Thus, the principles stated in *Chandler* have been adopted by the Court, even though *Chandler* itself is only a plurality opinion.[2]

The reasoning of *Chandler* applies here. The basic fact in *Chandler* was that there are five Articles in the Code of Alabama authorizing the incorporation of public hospitals, but only one type of public hospital was given immunity from suit. At issue

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in *Chandler* were "[t]he provisions of Article 5 of Chapter 21 of Title 22 ('Municipal Hospital Building Authorities') (Code 1975, § 22-21-130, *et seq.*) [which] were enacted in 1961." 500 So. 2d at 1014. Section 22-21-137(2) purported to give hospitals incorporated under the Municipal Hospital Building Authorities Act immunity from tort actions. *Ibid.* The Court noted that "Title 22, Chapter 21, Code 1975 ... contains five separate articles authorizing the organization and operation of public health facilities in Alabama, of which **only Article 5 affords immunity from tort actions**." *Ibid.* (emphasis added).

> The question of immunity for an authority organized under **Article 6** ("County and Municipal Hospital Authorities") is addressed in § 22-21-178:
>
> "No hospital organized under this article shall have governmental sovereignty or immunity."
>
> Article 6 also specifically provides that corporations authorized under this article may sue and be sued, both in tort and in contract. § 22-21-179.
>
> Similarly, **Article 4** ("County Hospital Boards and Corporations," § 22-21-70, et seq.) provides that a county hospital board or corporation has the power "[t]o maintain actions and have actions maintained against it and to defend action [sic] maintained against it," (§ 22-21-77(2)). **Article 11** ("Health Care Authorities," § 22-21-310, et seq.) allows a health care authority "[t]o sue and be sued in its own name in civil suits and actions, and to defend suits and actions against it, including suits and actions ex delicto and ex contractu, subject, however, to the provisions of chapter 93 of Title 11 ['Tort Claims and Judgments against Local Governmental Entities'], which chapter is hereby made applicable to the authority," (§ 22-21-318(a)(2)). Additionally, **Article 3** (§ 22-21-50, et seq.), the statutory authority for the establishment of "Public Hospital Associations," contains no immunity provision. Thus, of the several statutes authorizing the establishment and operation of public hospitals and facilities (Articles 3, 4, 5, 6, and 11), only Article 5 prescribes immunity from tort actions.

500 So. 2d at 1014-15 (footnote omitted; alterations in *Chandler*; emphasis added).

The Articles of the Code addressed in *Chandler* are the following:

1. Article 3, "Public Hospital Associations."
2. Article 4, "County Hospital Boards and Corporations."
3. Article 5, "Municipal Hospital Building Authorities."
4. Article 6, "County and Municipal Hospital Authorities."
5. Article 11, "Health Care Authorities."

Of all these Articles providing for establishment of hospitals with some involvement from cities or counties, only Article 11 includes a provision designating that the entity is subject to § 11-93-2.[3] Thus, for the same reasons as in *Chandler*, the provision in § 22-21-318(a)(2) is unconstitutional.

Furthermore, a plurality of the Court[4] in *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156, 165-71 (Ala. 1991) held that the $400,000 limit on noneconomic damages in medical liability actions, adopted in 1975 by the Legislature and codified at § 6-5-544(b), violated the equal protection rights guaranteed by §§ 1, 6, and 22 of the Alabama Constitution of 1901:

> It clearly appears that § 6-5-544(b), by balancing the direct and palpable burden placed upon catastrophically injured victims of medical malpractice against the indirect and speculative benefit that may be conferred on society, represents an unreasonable exercise of the police power. We hold, therefore, that § 6-5-544(b) violates the principle of equal protection as guaranteed by §§ 1, 6, and 22 of the Constitution of Alabama.

592 So.2d at 170. The same reasoning applies with even more force to any attempt to force catastrophically injured victims of medical negligence by Health Care Authorities, or the personal representatives of deceased victims, to shoulder some indirect and speculative benefit that may be conferred on society by limiting the liability of Health Care Authorities to only $100,000 in <u>total</u> damages, <u>one-fourth</u> of the amount of <u>noneconomic</u> damages allowed under the unconstitutional § 6-5-544(b).

In *Smith v. Schulte*, 671 So. 2d 1334, 1337-42 (Ala. 1995), a wrongful death action, a plurality (again with Justice Almon expressing no opinion on the equal-protection issue, 671 So. 2d at 1347) expressed the opinion that the $1,000,000 cap in § 6-5-547 violated equal protection of the laws:

> Section 6-5-547, in limiting recovery in certain wrongful death actions to $1,000,000, places a specific value on human life. Such a result represents a fundamental departure from the law and policy of this state as it has existed since 1877. See

Atkins v. Lee, 603 So.2d 937 (Ala.1992); *Central Alabama Electric Co-op v. Tapley*, 546 So.2d 371 (Ala.1989); *Estes Health Care Centers, Inc. v. Bannerman*, 411 So.2d 109 (Ala.1982); see also *South & North Alabama R.R. v. Sullivan*, 59 Ala. 272 (1877); *Savannah & M.R. Co. v. Shearer*, 58 Ala. 672 (1877). Far more troubling, however, is the fact that it assigns this value to one isolated class of Alabama citizens, namely, the victims of fatal medical malpractice.

> The notion that the lives of some of Alabama's citizens are worth less than the lives of others is an idea that carries the *gravest of implications*. We can conceive of nothing but the most compelling of circumstances that could justify the consequences of such a classification, with its attendant burden on the fundamental liberty interest of our people. Nothing but the strongest possible connection between the benefit sought and the means used to obtain it could justify such an odious burden on the fundamental liberty interest discussed above--which interest accrues to all Alabama citizens equally. This case involves neither the circumstances nor the necessary connection. Therefore, we hold that § 6-5-547 violates the equal protection guarantee of the Constitution of Alabama.

671 So. 2d at 1342 (emphasis in original). Applying § 11-93-2 to Health Care Authorities would carry even graver implications, because it would impinge upon an even smaller set of the entire class of medical liability wrongful-death victims - i.e., those killed by medical negligence at hospitals owned or run by Health Care Authorities - and would limit the worth of such lives to only $100,000, not the $1,000,000 held unconstitutional in *Smith v. Schulte*.

2. A Health Care Authority Cannot Be Deemed A Governmental Entity on Any Rational Basis

Chapter 93 of Title 11 applies to "governmental entities." Although § 22-21-318(a)(2) purports to bring health care authorities within the scope of Chapter 93 of Title 11, the other provisions of the HCAA demonstrate that Health Care Authorities cannot be deemed to be governmental entities on any rational basis.

Chapter 93 of Title 11 pertains to "tort claims and judgments against local governmental entities." Section 11-93-1 defines governmental entity as follows:

> (1) GOVERNMENTAL ENTITY. Any incorporated municipality, any county, and any department, agency, board, or commission of any municipality or county, municipal or county public corporations, and any such instrumentality or instrumentalities acting jointly. "Governmental entity" shall also include county public school boards, municipal public school boards and city-county school boards when such boards do not operate as functions of the State of Alabama. "Governmental entity" shall also mean county or city hospital boards when such boards are instrumentalities of the municipality or county or organized pursuant to authority from a municipality or county.

§ 11-93-1(1), Ala. Code 1975. All of these entities in this definition are reasonably included within the scope of the definition except, depending upon the circumstances, a county or city hospital board that is merely "organized pursuant to authority from a municipality or county." A hospital board that is an "instrumentalit[y] of the municipality or county" is controlled by the governmental entity. By virtue of being such an instrumentality it is reasonably deemed a governmental entity itself. However, as will be seen from the discussion below regarding Health Care Authorities, they are outside of the control of the city or county and thus cannot reasonably be deemed to be an instrumentality of the authorizing municipality or county. Their mere "organization pursuant to authority from a municipality or county" cannot support a rational conclusion that they are "governmental entities," any more than a private corporation whose existence arises by the filing of Articles of Incorporation with the Secretary of State can be deemed a governmental entity.

In *Home Indemnity Co. v. Anders*, 459 So. 2d 836 (Ala. 1984), the Court held that the cap for local governmental entities in § 11-93-2 was constitutional. The Court rejected the argument that § 11-93-2 violated the due process guarantee of § 13 of the Alabama Constitution or the equal protection of the laws guaranteed by § 1 of the Alabama Constitution. The Court agreed with the City of Mobile's argument that "the statute was designed to protect the financial solvency of local governmental entities, while at the same time affording an injured party the possibility of recovering a substantial sum." 459 So. 2d at 841 (emphasis added). The Court quoted with approval the conclusions of the Supreme Court of Wisconsin in *Stanhope v. Brown County*, 90 Wis. 2d 823, 842, 280 N.W. 2d 711, 719 (1979):

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> "We are unwilling to say that the legislature has no rational basis to fear that full monetary responsibility entails the risk of insolvency or intolerable tax burdens. Funds must be available in the public treasury to pay for essential governmental services; taxes must be kept at reasonable levels; it is for the legislature to choose how limited public funds will be spent. It is within the legitimate power of the legislature to take steps to preserve sufficient public funds to ensure that the government will be able to continue to provide those services which it believes benefits the citizenry. We conclude that the legislature's specification of a dollar limitation on damages recoverable allows for fiscal planning and avoids the risk of devastatingly high judgments while permitting victims of public tortfeasors to recover their losses up to that limit."

459 So. 2d at 841, quoting *Stanhope v. Brown County, supra* (emphasis added). Because the basis upon which § 11-93-2 was held constitutional ◉ against due-process and equal-protection challenges ◉ was the need to protect public tax monies and the operation of local governments, the question becomes whether a Health Care Authority bears any rational relationship to this basis for the enactment of and the constitutionality of § 11-93-2. If not, it violates equal protection of the laws to grant this limitation of liability to Health Care Authorities without also granting it to all hospitals, and it violates due process of law to arbitrarily and capriciously deprive injured persons and personal representatives of the full remedy they otherwise would have.

3. The 1987 Amendment Removes County Control Over Health Care Authorities

When first adopted, the HCAA provided for some control by the authorizing subdivision of the state - a municipality or a county - to maintain control over the health care authority such that it might have been deemed a "governmental entity." In § 22-21-316(a), provisions are made for the election of a board of directors of a health care authority, including the provision "that no fewer than a majority of the directors shall be elected by the governing body or bodies of one or more of the authorizing subdivisions." However, this provision is no longer in force if a Health Care Authority chooses to avoid it.

In 1987, the Legislature passed Act No. 87-745, which is codified as Article 11A, "Additional Power of Health Care Authorities," §§ 22-21-350 through -356. Pursuant to § 22-21-352(a)(1), a Health Care Authority "shall have the power to amend its certificate of incorporation or certificate of reincorporation ... so as to provide:"

> (1) That the governing body of an authorizing subdivision empowered ... to elect or appoint one or more directors shall so elect or appoint all or any of such directors **only from a list of nominees**, as provided in subdivision (2) below, **proposed by the board** ...; and
>
> (2) That in the case of a vacancy resulting from the expiration of the stated term of office of any such director, the board shall, not more than 90 nor less than 10 days prior to the expiration of such term of office ...:
>
> (a) By resolution duly adopted, propose a list of nominees (not less than 3 in number) for each place or seat on the board that is or is to become vacant as aforesaid; and
>
> (b) Cause a certified copy of such resolution to be filed with the governing body of the authorizing subdivision or subdivisions empowered to elect or appoint such director.

§ 22-21-352(a) (emphasis added). Thus, a Health Care Authority is now effectively independent of the authorizing subdivision, which can only rubber stamp a choice of one among three "nominees" proposed by the board to perpetuate itself.

This amendment to the HCAA only confirms provisions in the original HCAA that make it impossible to conclude that a Health Care Authority can rationally be classified as a "governmental entity."

4. The Powers Granted to Health Care Authorities Are Beyond Those That A Governmental Entity Can Constitutionally Exercise

Section 94 of the Alabama Constitution of 1901 prohibits political subdivisions of the State of Alabama from granting public money or lending credit to individuals or corporations:

> (a) The Legislature shall not have power to authorize any county, city, town, or other subdivision of this state to lend its credit, or to grant public money or thing of value in aid of, or to any individual, association, or corporation whatsoever, or to become a stockholder in any corporation, association, or company, by issuing bonds or otherwise.

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The Legislature granted powers to Health Care Authorities that would violate § 94 of the Constitution if they are governmental entities, as § 22-21-318(a)(2) purports to provide.

Section 22-21-318(a) grants broad powers to health care authorities, as set out in the endnote.[5] For example, a Health Care Authority can "acquire ... health care facilities ... within and without the state." § 22-21-318(a)(5). Could Jefferson County own a hospital in Hawaii or even in Mississippi? Not if § 94 of the Constitution is honored.

Sections 22-21-320 through -329 provide for the issuance by Health Care Authorities of securities. Such power is unavailable to local governmental entities due to the operation of §§ 222 and 225 of the Alabama Constitution of 1901, which allow for limited, strictly controlled issuance of bonds but not other securities.

Before the adoption in 1982 of the HCAA, the Supreme Court of Alabama repeated its long-standing holding that public hospital associations and corporations are not subdivisions of the State of Alabama subject to the limitations of § 94 of the Constitution of Alabama of 1901:

> The powers of public hospital associations and corporations are defined by statute. Section 22-21-1, Code 1975, et seq.
>
> Under these various statutes, public hospitals have the authority to make expenditures within the corporate powers which are necessary and appropriate and consistent with the maintenance of public health services and facilities. Of course, they are not authorized by statute, nor by common law, to exceed the corporate powers, nor may they ignore the fiduciary responsibilities and duties which are an integral part of all corporate existence.
>
> We simply hold, as we have so often, "that a public corporation is a separate entity from the state and from any local political subdivision, including a city or county within which it is organized." *Opinion of the Justices*, 254 Ala. 506, 49 So.2d 175 (1950). See also *Water Works Board of City of Leeds v. Huffstutler*, 292 Ala. 669, 299 So.2d 268 (1974).
>
> In *Knight v. West Alabama Environmental Improvement Authority*, 287 Ala. 15, 246 So.2d 903 (1971), this Court held:
>
> (T)he interdictions of Section 94 have reference to the kind of subdivisions of the State defined as political subdivisions such as the counties, cities, towns and probably certain districts which are endowed with governmental functions or powers, even though limited, and which are supported by and are responsible for the protection of public revenues.... Separate, independent public corporations are not political subdivisions of the State. They are not subdivisions of the State within the meaning of Section 94 of the Constitution, as amended. (287 Ala. at 20, 21, 246 So.2d at 906)
>
> We hold that public hospital corporations and public hospital associations created pursuant to the statutes referred to above are not political subdivisions of the state of Alabama and, thus, lawful expenditures by such public corporations or associations are not proscribed by the Constitution of Alabama.

Alabama Hospital Ass'n v. Dillard, 388 So. 2d 903, 905-06 (Ala. 1980).

The HCAA in 1982 granted broad powers to Health Care Authorities that §§ 94, 222, and 225 of the Constitution prohibit political subdivisions of the State from exercising. If the Legislature had not attempted to declare that Health Care Authorities are "governmental entities," the HCAA presumably would not violate §§ 94, 222, and 225. But by attempting to declare Health Care Authorities to be governmental entities for the purpose of the limitation of liability granted in § 11-93-2 to governmental entities, the Legislature overstepped the bounds of what the Alabama Constitution, in §§ 94, 222, and 225, allows the Legislature to do.

5. The 1990 Amendment Clarifies and Confirms That Health Care Authorities Are Not Governmental Entities

In 1990, the Legislature made the non-governmental nature of a Health Care Authority even more apparent when it adopted Act No. 90-532, which added Division 2 to Article 11A, "Further Additional Powers," §§ 22-21-357 through -359. Section 22-21-358 purports to grant additional powers to Health Care Authorities, including in part (all of it is pertinent, but these excerpts make the point) the powers:

> (1) To participate as a shareholder in a corporation, as a joint venturer in a joint venture, as a general or limited partner in a limited partnership or a general partnership, as a member in a nonprofit corporation

or as a member of any other lawful form of business organization, which provides health care or engages in activities related thereto;

(2) To make or arrange for loans, contributions to capital and other debt and equity financing for the activities of any corporation of which such authority is a shareholder, any joint venture in which such authority is a joint venturer, any limited partnership or general partnership of which such authority is a general or limited partnership, any nonprofit corporation in which such authority is a member or any other lawful form of business organization of which such authority is a member, and to guarantee loans and any other obligations for such purposes;

...

(4) To create, establish, acquire, operate or support subsidiaries and affiliates, either for profit or nonprofit, to assist such authority in fulfilling its purposes;

(5) To create, establish or support nonaffiliated for profit or nonprofit corporations or other lawful business organizations which operate and have as their purposes the furtherance of such authority's purposes ....

§ 22-21-358 (emphasis added). **These provisions authorize Health Care Authorities to engage in private business**. Under the HCAA as amended, a Health Care Authority either is not a governmental entity, and § 22-21-358 is constitutional, or it is a governmental entity, as § 22-21-318(a)(2) purports to provide, and § 22-21-358 violates § 94 of the Constitution.

The 1990 amendment says that its provisions, including § 22-21-358, are merely to "clarify" the powers of Health Care Authorities, merely "declarative of existing statutory law":

> It is the intent of the Legislature by the passage of this division to clarify existing provisions of statutory law respecting the powers of authorities. To that end, the grant to such authorities of the powers specified in Section 22-21-358 shall be deemed declarative of existing statutory law and shall therefore have both a prospective and a retroactive or retrospective operation.

§ 22-21-359.

Under these amendments, a Health Care Authority is authorized to become entangled in private enterprise under the "private enterprise" provisions of § 22-21-358 in such a way that a Health Care Authority can no longer, consistent with § 94 of the Alabama Constitution, take the position that it is in fact a "governmental entity." Thus, a Health Care Authority cannot now, if it ever could, be deemed a governmental entity within the scope of the limitation on liability of § 11-93-2.

But it is not just § 22-21-358 or the 1990 amendment that shows a Health Care Authority cannot be a governmental entity. Indeed, the powers set forth in § 22-21-358 are consistent with the broad powers granted in the original HCAA that are codified in §§ 22-21-318 and 22-21-320 through -329.

6. Other Statutory Provisions Governing Health Care Authorities Confirm That They Cannot Be Governmental Entities

Other portions of the initial HCAA are inconsistent with the provision in § 22-21-318(a)(2) purporting to declare that a Health Care Authority is a governmental entity within the scope of § 11-93-1 *et seq.*:

- Under § 22-21-316(c), a Health Care Authority is not subject to the Open Meetings Act, § 36-25A-1 *et seq.* "It is the policy of this state that the deliberative process of governmental bodies shall be open to the public during meetings." § 36-25A-1 (emphasis added). A board of a Health Care Authority is authorized by § 22-21-316(c) to meet in secret, so it cannot be a "governmental body." To say that it nevertheless could be a "governmental entity" would be irrational sophistry of a sort that cannot withstand rational-basis scrutiny.
- Under § 22-21-320 through -329, a Health Care Authority can issue securities. The State of Alabama and its subdivisions cannot. §§ 93, 94, 213, 222 (counties and cities may issue bonds under limited circumstances, but not securities in general), and § 225 (limitations on indebtedness of municipal corporations).
- Under § 22-21-325, the "obligations undertaken, and all securities issued, by an authority ... shall not create an obligation or debt of the state, any authorizing subdivision or any other county or municipality." The authorizing subdivision cannot pledge its faith and credit "for the payment of any securities issued by an authority." *Ibid.* A Health Care Authority can pledge its assets and revenues. §§ 22-21-318(8), -318(10), and -323. It is thus not a governmental entity,

and it is entirely independent financially of and from its authorizing subdivision.

- Under § 22-21-334, the Alabama Ethics Act, § 36-25-1, *et seq.*, i.e., the "Code of Ethics for Public Officials, Employees, Etc.," does not apply to a Health Care Authority. Its board, its officers, and its employees are unaccountable to the public.
- Under § 22-21-335, the competitive bid laws do not apply to Health Care Authorities: "Articles 2 and 3 of Chapter 16 of Title 41 shall not apply to any authority, the members of its board or any of its officers or employees." A Health Care Authority is thus entitled to spend its moneys as it sees fit without the protections given by the competitive bid laws to the spending of public moneys on public contracts.[6]
- As held in *Dellocono v. Thomas Hospital*, 894 So.2d 694 (Ala. Civ. App. 2004), a Health Care Authority is not the county for purposes of the notice of claims statutes, §§ 6-5-20 and 11-12-5. Thus, when a person injured at a Health Care Authority's facility sues the Health Care Authority, that person does not sue the authorizing county or city.
- Under § 22-21-344, a hospital tax can be allocated to a Health Care Authority under the limitations specified therein, but if the Health Care Authority does not receive public funds, the rationale for holding § 11-93-2 constitutional - "to protect the financial solvency of local governmental entities," *Home Indem. Co. v. Anders*, 459 So. 2d 836, 841 (Ala. 1984) - cannot apply to a Health Care Authority. Thus, there may also be grounds for an "as applied" argument - that the Health Care Authority in question does not in fact receive county or city funds, so it is not in fact a governmental entity.
- Under the clear import of these provisions, a Health Care Authority is not a governmental entity. Section 11-93-2 limits the liability of governmental entities to protect "the public treasury." *Home Indem. Co. v. Anders*, 459 So. 2d at 841. To grant this limitation on liability to Health Care Authorities would (1) violate an injured patient's (or a deceased patient's personal representative's) right to equal protection of the law as guaranteed by §§ 1, 6, and 22 of the Alabama Constitution of 1901, as held in *Chandler* and *Gaines, supra*; (2) violate an injured patient's or a representative's right to a remedy by due process of law as guaranteed by § 13 of the Ala. Const. of 1901; and (3) cause the remainder of the Health Care Authorities Act to violate §§ 93, 94, 213, 222, and 225 of the Alabama Constitution of 1901.

7. Limiting Medical Liability to $100,000 Violates § 13 by Depriving Plaintiffs of a Remedy

A hospital is a "health care provider" within the scope of the Alabama Medical Liability Act. § 6-5-481(8), Ala. Code 1975. Medical liability actions require evidence from a "similarly situated health care provider" that the defendant health care provider breached the applicable standard of care. § 6-5-548, Ala. Code 1975. This necessarily means that a plaintiff injured in a hospital, or the personal representative of a patient killed by medical negligence in a hospital, will be required to present expert testimony from one or more medical professionals. Such witnesses charge high hourly rates as a condition of agreeing to testify. For this and other reasons, the expense of developing the evidence necessary to meet the plaintiff's burden of proof in a medical liability action usually approaches or even exceeds $100,000. Even if the total expenses were to equal only $50,000 in a case against a Health Care Authority, applying the $100,000 cap would mean that the plaintiff is spending $50,000 to make a maximum of $50,000 after payment of expenses - and that would be true only if her attorneys spent long hours over several years to bring a case to judgment without charging a fee! No plaintiff could bring such an action.

Article I, Section 13 of the Alabama Constitution of 1901 guarantees

> That all courts shall be open; and that every person, for any injury done him, in his lands, goods, person, or reputation, shall have a remedy by due process of law; and right and justice shall be administered without sale, denial, or delay.

In *Grantham v. Denke*, 359 So.2d 785 (Ala. 1978), the Supreme Court of Alabama held that a 1975 amendment to the Worker's Compensation Act violated § 13:

> [Section] 13 of the Alabama Constitution preserves a right of action of the injured employee against her or his co-employee as well as preserving a remedy for enforcement of that right. The right existed at common law against both employer and co-employee. Enactment of the Workmen's Compensation Act may provide an elective substitute for the remedy of enforcement against the employer in governance of the relationship of

> employer-employee. It may not deprive the injured employee of rights against the co-employee, the actual wrongdoer, for it offers no elective substitute remedy for enforcement of these rights.

359 So.2d at 788. Medical liability actions existed at common law. *McTyeire v. McGaughy*, 222 Ala. 100, 130 So. 784 (1930); *Moore v. Smith*, 215 Ala. 592, 111 So. 918 (1927). To arbitrarily deprive a victim of medical negligence of any effective remedy would violate § 13 of the Alabama Constitution of 1901.

8. Limiting Medical Liability to $100,000 Violates § 11 of the Constitution by Violating the Right of Trial by Jury

In *Moore v. Mobile Infirmary, supra*, 592 So.2d at 159-65, the Supreme Court struck down the $400,000 cap on noneconomic damages in medical liability actions on the ground that it violated the right of trial by jury as guaranteed by Article I, § 11 of the of the Alabama Constitution of 1901:

> It is not relevant, under a § 11 analysis, that the statute has not entirely abrogated the right to empanel a jury in this type of case. The relevant inquiry is whether the function of the jury has been impaired. Because the right to a jury trial "as it existed at the time the Constitution of 1901 was adopted must continue 'inviolate,' " the pertinent question "is not whether [the right] still exists under the statute, but whether it still remains inviolate." *Alford v. State ex rel. Attorney General*, 170 Ala. 178, 197, 54 So. 213, 218 (1910) (Mayfield, Sayre, and Evans, JJ., dissenting). "For such a right to remain inviolate, it must not diminish over time and must be protected from all assaults to its essential guaranties." *Sofie v. Fibreboard Corp.*, 112 Wash.2d 636, 656, 771 P.2d 711, 722 (1989).
>
> Because the statute caps the jury's verdict automatically and absolutely, the jury's function, to the extent the verdict exceeds the damages ceiling, assumes less than an advisory status. This, as our cases illustrate, is insufficient to satisfy the mandates of § 11. See *Thompson v. Southern Ry.*, 17 Ala.App. 406, 408, 85 So. 591, 592-93 (1920). A "constitution deals with substance, not shadows. Its inhibition [is] leveled at the thing, not the name." *Cummings v. Missouri*, 71 U.S. (4 Wall.) 277, 325, 18 L.Ed. 356 (1866). Consequently, we hold that the portion of § 6-5-544(b), imposing a $400,000 limitation on damages for noneconomic loss represents an impermissible burden on the right to a trial by jury as guaranteed by § 11 of the Constitution of Alabama.

592 So.2d at 164-65.

In *Smith v. Schulte, supra*, 671 So 2d at 1342-44, the Court held that the $1,000,000 cap on medical liability actions violated the right of trial by jury in a wrongful death action. It included a distinguishing of § 11-93-2 based on the status of counties and cities because they "are creations of the sovereign, the State of Alabama, and because they exercise certain governmental functions that are dependent upon tax dollars":

> Thus, in imposing, regardless of the facts in each case, an absolute limitation on the amount of damages the jury may assess, § 6-5-547 operates precisely like the sections invalidated in *Moore* and *Henderson [v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1973)], specifically, it inhibits the jury in the most fundamental aspect of its function. The conclusion is inevitable, therefore, that § 6-5-547 violates the right to trial by jury as guaranteed by § 11 of the Constitution of Alabama.

This conclusion is not inconsistent with *Garner v. Covington County*, 624 So.2d 1346 (Ala.1993), another case on which the defendants rely. In that case, the Court held that Ala.Code 1975, § 11-93-2, which limited to $100,000 jury awards of damages against "governmental entit[ies]," did not violate § 11. 624 So.2d at 1354. The holding in *Garner* rested on the "unique status of counties and cities as governmental entities." Id. at 1351. "Because they are creations of the sovereign, the State of Alabama, and because they exercise certain governmental functions that are dependent upon tax dollars," the Court explained, "actions against them have always been subject to reasonable regulation by the legislature on a basis not applicable to actions against individuals and other entities." Id.

The distinction between the entities subject to § 11-93-2 and those subject to § 6-5-547 renders these respective statutes so fundamentally distinguishable as to eliminate the need for further elaboration. Suffice it to say, as did the trial judge: "The defendants in the

> case at bar do not enjoy the unique status of counties or cities; and, therefore, no such status, crucial to the rationale of *Garner*, supports the constitutionality of the § 6-5-547 cap on any wrongful death judgment against medical providers." C.R. 1055.

671 So.2d at 1343-44. Health Care Authorities are not like counties and cities, as shown above. Certainly they do not "exercise ... governmental functions" - they are self-perpetuating private health care providers. A Health Care Authority may very likely not be "dependent upon tax dollars." For the same reasons that § 6-5-547 violated the right of trial by jury, as held in *Smith v. Schulte*, application of § 11-93-2 to Health Care Authorities, or at least to any Health Care Authority which admittedly receives no tax dollars from its authorizing governmental subdivision, would violate Article I, § 11 of the Alabama Constitution of 1901.

CONCLUSION

Tennessee Valley held that a Health Care Authority is subject to the Open Records Act. The board of directors of that Health Care Authority included the chairman of the county commission, the mayor of Florence, three citizens appointed by the county, three citizens appointed by the city, and three physicians appointed by the staff of the hospitals owned by the Health Care Authority. Ms. p. 3, n. 1. If a Health Care Authority has taken advantage of the 1987 amendment adding § 22-21-352 to the HCAA, it will not be under direct government control. Even if the authorizing subdivision retains the right to appoint the board of directors, the HCAA granted powers to Health Care Authorities that § 93, 94, 222, and 225 of the Alabama Constitution prohibit the State of Alabama and its subdivisions from having or exercising. To give such a non-governmental entity the limitation on liability of § 11-93-2 has no basis in protecting public tax moneys or governmental functions and so must fall. Finally, to give some quasi-public hospitals but not others the protection of § 11-93-2 would violate the equal protection guarantees of § 1, 6, and 22 of the Alabama Constitution of 1901.

ENDNOTES

1. Since *Chandler*, there has been some questioning as to whether the Constitution of Alabama of 1901 guarantees equal protection, but the facts remain that (1) there are majority opinions holding in the affirmative on this question and (2) the various opinions in *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999) tend more to support an affirmative answer than the negative answer - i.e., no equal protection - that the lead opinion purports to establish. *See also* the following:

> The question whether § § 1, 6, and 22 of Article I, Constitution of Alabama 1901, combine to guarantee the citizens of Alabama equal protection under the laws remains in dispute. See *Black v. Pike County Comm'n*, 360 So. 2d 303 (Ala. 1978); *Ex parte Jackson*, 516 So.2d 768 (Ala.1986), and *Ex parte Branch*, 526 So. 2d 609 (Ala. 1987) (implying that those provisions do provide for equal protection); but see *Ex parte Melof*, 735 So. 2d 1172 (Ala. 1999). In this case, however, that dispute is rendered academic.

Hutchins v. DCH Regional Med. Ctr., 770 So. 2d 49, 59 (Ala. 2000).

2. Justices Shores and Beatty concurred specially in *Chandler* on a ground that made it unnecessary to reach the constitutional issue. They did not disagree with the reasoning of the plurality on the equal protection holding; they simply did not see the need to reach the issue. 500 So. 2d at 1018-19.

3. Section 11-93-1(1) defines "governmental entity" to include "county or city hospital boards when such boards are instrumentalities of the municipality or county or organized pursuant to authority from a municipality or county." This might be deemed to include entities organized under Division 1 of Article 4. Even if so, that leaves Article 3, Division 2 of Article 4, Article 5, and Article 6 outside the provisions of § 11-93-2.

4. Justice Almon concurred in the portion of the opinion, discussed below, which held that the cap violated the right of trial by jury; he expressed no opinion as to the equal protection holding. 592 So. 2d at 178.

5.

> (1) To have succession by its corporate name for the duration of time, which may be in perpetuity, specified in its certificate of incorporation or until dissolved as provided in Section 22-21-339;
>
> (2) To sue and be sued in its own name in civil suits and actions, and to defend suits and actions against it, including suits and actions ex delicto and ex contractu, subject, however, to the provisions of Chapter 93 of Title 11, which chapter is hereby made applicable to the authority;
>
> (3) To adopt and make use of a corporate seal and to alter the same at pleasure;
>
> (4) To adopt, alter, amend and repeal bylaws, regulations and rules, not inconsistent with the provisions of this article or its certificate of incorporation, for the regulation and conduct of its affairs and business;
>
> (5) To acquire, construct, reconstruct, equip, enlarge, expand, alter, repair, improve, maintain, equip, furnish and operate health care facilities at such place or places, within **and without** the boundaries of its authorizing subdivisions and within **and without** the state, as it considers necessary or advisable;
>
> (6) To lease or otherwise make available any health care facilities or other of its properties and assets to such persons, firms, partnerships, associations or corporations and on such terms as the board deems to be appropriate, to charge and collect rent or other fees or charges therefor and to terminate any such lease or other agreement upon the failure of the lessee or other party thereto to comply with any of its obligations thereunder;
>
> (7) To receive, acquire, take and hold (whether by purchase, gift, transfer, foreclosure, lease, devise, option or otherwise) real and personal property of every description, or any interest therein, and to manage, improve and dispose of the same by any form of legal conveyance or transfer; provided however, that the authority shall not, without the prior approval of the governing body of each authorizing subdivision, have the power to

IS A HEALTH CARE AUTHORITY CONSTITUTIONALLY ENTITLED TO INVOKE THE $100.000 CAP ON LIABILITY FOR A LOCAL GOVERNMENT ENTITY?

dispose of (i) substantially all its assets, or (ii) any health care facilities the disposition of which would materially and significantly reduce or impair the level of hospital or health care services rendered by the authority; and provided further, that the foregoing proviso shall not be construed to require the prior approval of any such governing body for the mortgage or pledge of all or substantially all its assets or of any of its health care facilities, for the foreclosure of any such mortgage or pledge or for any sale or other disposition thereunder;

(8) To mortgage, pledge or otherwise convey its property and its revenues from any source;

(9) To borrow money in order to provide funds for any lawful corporate function, use or purpose and, in evidence of such borrowing, to sell and issue interest-bearing securities in the manner provided and subject to the limitations set forth hereinafter;
(10) To pledge for payment of any of its securities any revenues (including proceeds from any hospital tax to which it may be entitled) and to mortgage or pledge any or all of its health care facilities or other assets or properties or any part or parts thereof, whether then owned or thereafter acquired, as security for the payment of the principal of and the interest and premium, if any, on any securities so issued and any agreements made in connection therewith;

...

(14) To contract for the operation of any department, section, equipment or holdings of the authority, and to enter into agreements with any person, firm or corporation for the management by said person, firm or corporation on behalf of the authority of any of its properties or for the more efficient or economical performance of clerical, accounting, administrative and other functions relating to its health care facilities;

(15) To establish, collect and alter charges for services rendered and supplies furnished by it;

(16) To make all needful or appropriate rules and regulations for the conduct of any health care facilities and other properties owned or operated by it and to alter such rules and regulations;

(17) To provide for such insurance as the business of the authority may require;

(18) To receive and accept from any source aid or contributions in the form of money, property, labor or other things of value, to be held, used and applied to carry out the purposes of this article, subject to any lawful condition upon which any such aid or contributions may be given or made;

...

(23) To assume any obligations of any entity that conveys and transfers to the authority any health care facilities or other property, or interest therein, provided that such obligations appertain to the health care facilities, property or interest so conveyed and transferred to the authority;

(24) To assume, establish, fund and maintain retirement, pension or other employee benefit plans for its employees;

...

(27) To the extent permitted by the holders of its securities, to purchase securities out of any of its funds or moneys available therefor and to hold, cancel or resell such securities;

...

(32) To enter into such contracts, agreements, leases and other instruments, and to take such other actions, as may be necessary or convenient to accomplish any purpose for which the authority was organized or to exercise any power expressly granted hereunder.

§ 22-21-318(a) (emphasis added).

6. County and municipal hospital authorities are subject to the Ethics Act and the competitive bid law. §§ 22-21-189 and -190, Ala. Code 1975.

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